UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KELLY FUSCO,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-264-P-H***
	)	
DEAN GOODALE,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant, Dean Goodale, a Portland police officer, moves for summary judgment on all claims asserted by the plaintiff, Kelly Fusco, in this action arising out of an arrest made on May 10, 2001. I recommend that the court grant the motion in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining

whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The following undisputed material facts are appropriately presented in the parties' statements of material facts submitted pursuant to this court's Local Rule 56.

On May 10, 2001 the defendant responded to 58 Chestnut Street in Portland, Maine, for a report of a broken window at the family shelter next door. Plaintiff's Reply Statement of Material Facts, etc. ("Plaintiff's SMF") (Docket No. 12) ¶ 1; Police Officer Dean Goodale's Response to the Plaintiff's Reply Statement of Facts ("Defendant's Responsive SMF") (Docket No. 15) ¶ 1. The plaintiff lived in apartment three at that address. Police Officer Dean Goodale's Statement of Supporting Material Facts ("Defendant's SMF") (Docket No. 9) ¶ 12; Plaintiff's Response to Defendant's Statement of Supporting Material Facts ("Plaintiff's Responsive SMF") (Docket No. 11) ¶ 12. The defendant had been called to that residence earlier that day for a report of an argument between the plaintiff and her former boyfriend. Plaintiff's SMF ¶ 1; Defendant's Responsive SMF ¶ 1. On that occasion, the defendant spoke with the plaintiff for five to ten minutes; the plaintiff was

asked to go inside. *Id*. ¶¶ 2-3. Officer Kezak also responded to this call. Defendant's SMF ¶ 27; Plaintiff's Responsive SMF ¶ 27.

Some time later, but before the call about the broken window, dispatch called in another disturbance between 56 and 58 Chestnut Street, involving yelling between the plaintiff and Rikki Brown, one of her neighbors. Plaintiff's SMF ¶¶ 4-5; Defendant's Responsive SMF ¶¶ 4-5. The defendant and Kezal responded to this call. Defendant's SMF ¶ 43; Plaintiff's Responsive SMF ¶ 43. The defendant told the plaintiff that she would be arrested if she continued to cause a disturbance in the neighborhood and told her to go inside her apartment. *Id*. ¶¶ 51-52. About 15 minutes later, the defendant again responded to Chestnut Street in order to investigate a complaint from Brown that the plaintiff had thrown a rock at her window. *Id*. ¶ 55. Brown told the defendant that the plaintiff's boyfriend was chasing Brown's boyfriend. *Id*. ¶ 59. The defendant told Brown that he would return to discuss the rock-throwing incident and left to try to locate the men. *Id*. ¶ 60.

While the defendant and Kezal were looking for the men, they received a report that the plaintiff had thrown a rock through the window on the first floor of the shelter. *Id*. ¶ 61. The defendant observed the broken window upon his return. *Id*. ¶ 65. A security guard reported to the defendant that he had seen the plaintiff throw what appeared to be a rock which broke a window in the shelter. *Id*. ¶ 66. Brown also told the defendant that she had seen the plaintiff break the window. *Id*. ¶ 67. The defendant decided to arrest the plaintiff and requested that a police arrest van and his supervisor respond to the scene. *Id*. ¶¶ 69-70. When his supervisor, Sgt. Preis, arrived, the defendant informed him about the situation involving the plaintiff. *Id*. ¶ 73.

A wooden exterior stairway led from an alleyway at 58 Chestnut Street to a porch-like wooden platform located outside of a window in the kitchen of apartment three. *Id*. ¶ 13. The defendant found the plaintiff smoking a cigarette and sitting in a chair inside a second-floor window that opened out to

a fire escape (the exterior wooden stairway). Plaintiff's SMF ¶ 10; Defendant's Responsive SMF ¶ 10; Defendant's SMF ¶ 14; Plaintiff's Responsive SMF ¶ 14. The plaintiff was swearing at her neighbors and the security guards. Plaintiff's SMF ¶ 13; Defendant's Responsive SMF ¶ 13. Three or four police officers walked up the exterior stairs toward the plaintiff's apartment, with the defendant in the lead followed by Kezal. Defendant's SMF ¶¶ 77-78; Plaintiff's Responsive SMF ¶¶ 77-78. The bottom half of the window leading from the plaintiff's kitchen to the top of the exterior stairs was wide open. *Id*. ¶ 80. Although the defendant had decided to arrest the plaintiff, he chose to talk with her before taking any action. *Id*. ¶ 83. The defendant asked the plaintiff to step onto the platform and she refused. *Id*. ¶¶ 96-97. The defendant then advised the plaintiff that she was under arrest for disorderly conduct and criminal mischief. Plaintiff's SMF ¶ 14; Defendant's Responsive SMF ¶ 14.

The defendant attempted to take the plaintiff into custody as she stood at the open window, which was a fire exit from the apartment and which the defendant likened to the threshold of a doorway. Defendant's SMF ¶ 111; Plaintiff's Responsive SMF ¶ 111. The defendant reached through the open window and put his hand on the plaintiff's shoulder. Plaintiff's SMF ¶ 15; Defendant's Responsive SMF ¶ 15; Defendant's SMF ¶ 124; Plaintiff's Responsive SMF ¶ 124. The plaintiff stood up, pushed and pulled away and withdrew into the apartment. Plaintiff's SMF ¶ 15; Defendant's Responsive SMF ¶ 15. After stepping back, the defendant stepped forward again, intending to continue his effort to take the plaintiff into custody, but the window closed on his hand and caught his thumb. Defendant's SMF ¶ 117; Plaintiff's Responsive SMF ¶ 117. The defendant's thumb was injured. *Id*. ¶ 119. He reopened the window and told the plaintiff again that he was going to arrest her. *Id*. ¶ 122.

The plaintiff took two steps backward into her apartment. *Id*. ¶ 123. The defendant entered the apartment through the window. Plaintiff's SMF ¶ 16; Defendant's Responsive SMF ¶ 16. After the

defendant entered the apartment, the plaintiff physically resisted being taken into custody "with all her might." Defendant's SMF ¶ 131; Plaintiff's Responsive SMF ¶ 131. She refused to cooperate in any way with the defendant and the other officers as they attempted to take her into custody inside her apartment. *Id*. ¶ 135. Kezak and Officers O'Connor and Brown assisted the defendant in his attempts to take the plaintiff into custody. *Id*. ¶ 136. After the defendant and Kezal released the plaintiff's arms, she sat on the floor and kicked at the officers. *Id*. ¶ 141. Brown sprayed the plaintiff with a chemical while the officers were attempting to take her into custody. *Id*. ¶ 147.[1]

After the plaintiff was handcuffed in her apartment, she was escorted down an interior stairwell to a police van that was parked outside her building. *Id*. ¶ 152. She was held by the arms as she was brought down the interior stairwell. *Id*. ¶ 153. The stairwell was narrow; the defendant was behind the plaintiff, Brown and O'Connor as they descended. *Id*. ¶¶ 156-57. As she was being brought down the stairs, the plaintiff grabbed onto the handrail and threatened to throw herself down the stairwell. *Id*. ¶ 163. After she was brought outside, the plaintiff was placed onto the bumper of the police van. *Id*. ¶ 167. After the plaintiff arrived at the van, the defendant immediately asked a security guard for some water that could be used to wash off the chemical that had been sprayed on the plaintiff. *Id*. ¶ 168. Water was brought to the plaintiff within a minute or so of the request. *Id*. ¶ 172. The plaintiff cooperated to some degree when the officers were sliding her into the van by moving her body in a way that allowed her to move inside without difficulty. *Id*. ¶ 181. O'Connor transported the plaintiff to the Cumberland County Jail where the residue of the chemical was washed off with a hose. *Id*. ¶¶ 183-84.

[1] The plaintiff's response to this paragraph of the defendant's statement of material facts states: "The Plaintiff admits Paragraph 147 of Defendant's Statement of Supporting Material Facts, in that she was sprayed, but only after she was handcuffed." Plaintiff's Responsive SMF ¶ 147. This response is an attempted qualification rather than an admission, and the additional factual allegation requires a record citation. Local Rule 56(c). Because no citation is given, the additional allegation will be disregarded by the court. Local Rule 56(e).

The plaintiff had visible bruises on her arms, legs and ear. Plaintiff's SMF ¶ 23; Defendant's Responsive SMF ¶ 23. Her shirt was ripped. *Id*. ¶ 24.

The plaintiff claims that (i) the defendant was violent when taking her into custody, (ii) she sustained bruises on her arms during her encounter with the police, (iii) she sustained a bruise near her ear that occurred either when she was placed in the van or when she hit the wall while being taken down the stairwell, (iv) she suffered an injury to her knee that occurred while she was being put into the van, (v) her shirt was ripped while she was struggling with the police, and (vi) she suffered a psychological injury as a result of her arrest. Defendant's SMF ¶ 185; Plaintiff's Responsive SMF ¶ 185.

III. Discussion

The complaint alleges violations of the plaintiff's rights to due process of law and against unreasonable search and seizure, a claim brought under 42 U.S.C. § 1983, and of 15 M.R.S.A. § 704. Amended Complaint (Docket No. 5) ¶¶ 19-24. The amended complaint does not further specify the basis of the constitutional charges, but her memorandum of law submitted in opposition to the motion for summary judgment makes clear that she contends that the defendant's entry into her apartment was unlawful and that he used excessive force in arresting her. Plaintiff's Response to Defendant's Motion for Summary Judgment, etc. ("Opposition") (Docket No. 10) at 4, 7. Her memorandum cannot reasonably be read to include a contention that the defendant lacked probable cause to arrest her at the relevant time, and I accordingly will not address that issue.

A. Due Process Claim

"[*A*]*ll* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process'

approach." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphasis in original). Substantive due process claims are appropriate when the objectionable conduct occurred "outside of a criminal investigation or other form of governmental investigation or activity." *Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002). Here, the plaintiff cites only *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), in support of her substantive due process claim, Opposition at 7-9, but that case did not involve an arrest or other seizure of the complaining individual, and no Fourth Amendment claim was or could have been asserted, 523 U.S. at 836-37. Under the circumstances of the instant case, the defendant is entitled to summary judgment on that portion of Count I that raises a substantive due process claim.

B. Fourth Amendment Claim

Count I of the amended complaint also asserts Fourth Amendment claims under 42 U.S.C. § 1983 alleging that the defendant's entry into the plaintiff's apartment was unlawful and that he used excessive force in effecting her arrest. Amended Complaint ¶¶ 15, 17-19. The defendant contends both that these claims cannot stand on the basis of the evidence and that he is entitled to qualified immunity against the claims. Officer Goodale's Motion for Summary Judgment, etc. ("Motion") (Docket No. 8) at 8-20. In the context of section 1983 claims, the doctrine of qualified immunity provides that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

When a defendant seeks qualified immunity, the Supreme Court has directed that a ruling on that issue should be made by the court in advance of trial. *Saucier v. Katz*, 533 U.S. 194, 2000 (2001). The initial inquiry must be: "Taken in the light most favorable to the party asserting the injury,

do the facts alleged show the officer's conduct violated a constitutional right?" *Id*. at 201. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id*. This inquiry must be undertaken in light of the specific facts of the case. *Id*. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. at 202. These three inquiries must be made in sequence, and a single negative answer is sufficient to defeat the plaintiff's claim. *Hatch v. Department for Children, Youth & Their Families*, 274 F.3d 12, 20 (1st Cir. 2001).

"The threshold inquiry is whether the plaintiff's allegations, if true, establish a constitutional violation." *Suboh v. District Attorney's Office Suffolk Dist.*, 298 F.3d 81, 90 (1st Cir. 2002) (citation omitted.) With respect to the claim of unlawful entry into the plaintiff's apartment, both parties rely on the decision of the Maine District Court granting the plaintiff's motion to dismiss the charges brought against her following the arrest at issue here. Motion at 8, n.13; Opposition at 3, 6-7. That order does not address the plaintiff's excessive force claim, but it is relevant to the claim of illegal entry.

"Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984). After an evidentiary hearing, the Maine District Court found Goodale's entry into the plaintiff's apartment was not incidental to the hot pursuit of a fleeing criminal, Order [dated September 5, 2001], *State of Maine v. Kelly L. Fusco*, Maine District Court (Portland), Docket No. POR-CR-01-3875 (Exh. 5 to Deposition of Officer Dean W. Goodale), at 3, the only "exigent circumstances" relied upon by the defendant in this case, Motion at 11-12, 13. The defendant argues that the state court's "finding that

there were no exigent circumstances was erroneous," and that he "has an absolute right to a redetermination of [the question whether] exigent circumstances existed[] in the context of this Section 1983 litigation." Police Officer Dean Goodale's Reply to the Plaintiff's Objection to the Motion for Summary Judgment ("Reply") (Docket No. 14) at 2. It is not necessary to determine whether the defendant's view of Maine law is correct; even if he is entitled to a "redetermination" in this court, he is clearly not entitled to summary judgment on the point for the reasons that follow. Similarly, if the conclusion of the state court should be given collateral estoppel effect, that conclusion favored the plaintiff on this point. The plaintiff has not moved for summary judgment, so it is not necessary to determine whether such offensive use of the state court's conclusion is permissible under Maine law.

Contrary to the defendant's view, the facts material to the question whether his entry into the plaintiff's apartment was lawful under the circumstances are in dispute in this action. The disputed and undisputed evidence in the summary judgment motion, Defendant's SMF ¶¶ 14, 53-54, 75, 79, 110; Plaintiff's Responsive SMF ¶¶ 14, 53-54, 75, 79, 110; Plaintiff's SMF ¶ 12; Defendant's Responsive SMF ¶ 12, does not establish that the window through which the defendant spoke to the plaintiff was the same as a threshold for purposes of analysis of the constitutional claim;[2] even if that characterization of the evidence were the only possible one under the circumstances, the degree to which the defendant reached through the window in an attempt to place the plaintiff under arrest cannot reasonably be characterized as a "slight entry" to which the plaintiff "acquiesced." *Sparing v. Village of Olympia Fields*, 266 F.3d 684, 688-91 (7th Cir. 2001). Nor does the undisputed evidence establish justification for the entry as "hot pursuit" or otherwise as undertaken under "exigent circumstances." Under Maine law, exigent circumstances

[2] For example, the evidence in the summary judgment record does not establish that the plaintiff, while standing inside the window, was "visible to the public" and "exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." *United States v. Santana*, 427 U.S. 38, 42 (1976). Accordingly, the plaintiff's retreat further into her apartment after the (*continued on next page*)

> exist where there is a compelling need to conduct a search and insufficient time in which to secure a . . . warrant. In exigent circumstances, to require the officers to delay the search until they have obtained a warrant would have a strong likelihood of frustrating the fulfillment of the governmental interest conferring the probable cause to intrude upon the privacy of property. The officers' legitimate concern with apprehending a suspect is heightened in cases involving particularly dangerous criminal activity.

State v. Moulton, 481 A.2d 155, 164 (Me. 1984) (citations and internal quotation marks omitted).[3] Here, the defendant offers only the conclusory assertion that "[u]nder the circumstances, it was not practicable to obtain a warrant for Ms. Fusco's arrest." Defendant's SMF ¶ 107. This is insufficient to establish exigent circumstances for purposes of summary judgment. The criminal activity at issue was not particularly dangerous, nor do the circumstances establish a strong likelihood that delay would frustrate fulfillment of the governmental interest expressed in the criminal statutes under which the plaintiff was charged. *See also Boilard*, 488 A.2d at 1382-83, 1384-5. The concept of "hot pursuit" involves following an individual from a public place into a private place, *State v. Pease*, 520 A.2d 698, 700 (Me. 1987); as discussed above, the evidence in the summary judgment record does not establish that the plaintiff was in a public place when she arguably committed the crime of assaulting the defendant. Similarly, under federal law, exigent circumstances exist where "there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *Fletcher v. Town of Clinton*, 196 F.3d 41, 49 (1st Cir. 1999) (citation omitted). Despite the generosity of this standard to police "in cases where potential danger, emergency conditions or other exigent circumstances are present," *id*., no such showing has been made by the defendant here.

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defendant attempted to arrest her through the window is distinguishable from the retreat in *Santana*.

[3] *Moulton* involved a warrantless search for evidence and a suspect, 381 A.2d at 163-65, rather than an entry in order to effect an arrest. My research has located no reported decision of the Maine Law Court discussing exigent circumstances in the context of the latter scenario, but I conclude that the Law Court would apply essentially the same description to the term under the factual situation that is present in this case. *See State v. Boilard*, 488 A.2d 1380, 1383 (Me. 1985) ("Warrantless entries into private homes for purposes of search, or arrest for that matter, are equally unreasonable . . . .").

Accordingly, the plaintiff's allegations, if true, establish a violation of the Fourth Amendment with respect to the entry of the defendant into her apartment. The constitutional right to be free of unlawful entries into one's dwelling place is well-established. While the final inquiry in the qualified-immunity analysis presents a close question, I conclude that a reasonable officer under the circumstances set forth in the summary judgment record would conclude that the entry into the plaintiff's apartment through the window was unlawful under the circumstances. Accordingly, the defendant is not entitled to qualified immunity on this aspect of Count I and the claim may be presented to a jury.

With respect to the excessive force claim, the plaintiff has submitted evidence, disputed by the defendant, which, if believed, would establish a Fourth Amendment violation.

> The pertinent question is whether the force used was "objectively reasonable" under all the circumstances; that is, whether it was consistent with the amount of force that a reasonable police officer would think necessary to bring the arrestee into custody. Proper application of the test of "objective reasonableness' requires the courts to pay careful attention to the facts and circumstances of the particular case at hand, including the severity of the crime, whether the suspect posed an immediate threat to the safety of the officers or others, and whether [s]he was actively resisting arrest or attempting to evade arrest by flight.

Gaudreault v. Municipality of Salem, 923 F.2d 203, 205 (1st Cir. 1990) (citations omitted).

Here, the plaintiff contends that the defendant "slammed her to the floor," directed another officer to spray her with pepper spray after she had been handcuffed, picked her up "very roughly by the handcuffs," slammed her off the walls of the stairwell three times, and "hurled her inside the paddy wagon so hard that she traveled like a bowling ball across the floor, hit the opposite wall hard enough to knock off both her earrings and her watch." Plaintiff's SMF ¶¶ 16-19, 22. The defendant describes the plaintiff's testimony as "dubious," and inconsistent with other facts which she has admitted, Reply at 5-6, but these characterizations go to the weight of the plaintiff's evidence, which is not at issue in

connection with a motion for summary judgment. If the plaintiff's evidence is believed, a violation of the Fourth Amendment occurred. The constitutional right to be free of excessive force during an arrest is well established. *See generally McLain v. Milligan*, 847 F. Supp. 970, 976-77 (D. Me. 1994).[4] A reasonable police officer would have known that the actions described by the plaintiff violated her Fourth Amendment rights. The defendant is not entitled to qualified immunity on the claim of excessive force set forth in Count I nor is he entitled to summary judgment on the merits of that claim.

C. State Law Claim

Count II of the amended complaint invokes 15 M.R.S.A. § 704, which provides, in relevant part:

> Every . . . police officer shall arrest and detain persons found violating any law of the State . . . until a legal warrant can be obtained . . .; but if, in so doing, he acts wantonly or oppressively, or detains a person without a warrant longer than is necessary to procure it, he shall be liable to such person for the damages suffered thereby.

15 M.R.S.A. § 704. The defendant contends that the summary judgment record "*clearly* demonstrates that rather than acting 'wantonly or oppressively' . . . [he] acted reasonably and with more restraint than one would ordinarily expect" under the circumstances and that he had probable cause to arrest the plaintiff.[5] Motion at 19 (emphasis in original).[6] The contention that the existence of probable cause to

[4] Fourth Amendment rights cannot be overridden by a state statute such as 17-A M.R.S.A. § 107(1), upon which the defendant relies. Motion at 14. That statute allows a police officer to use a "reasonable degree of nondeadly force" "[w]hen and to the extent that he reasonably believes it necessary" to effect an arrest or to defend himself from what he reasonably believes to be the imminent use of nondeadly force encountered while attempting to effect an arrest. The use of force that is excessive under the Fourth Amendment cannot be reasonably necessary within the meaning of this statutory language. *See State v. Austin*, 381 A.2d 652, 655 (Me. 1978) ("The officer's use of force, *if not excessive*, is lawful (under section 107) unless he knows the arrest is illegal.") (Emphasis added.).

[5] The plaintiff does not respond at all to the defendant's arguments concerning Count II. While she has therefore waived opposition to the motion as to this count, the fact that the pending motion is one for summary judgment means that this court must nonetheless consider it on the merits. *Redman v. FDIC*, 794 F. Supp. 20, 21-22 (D. Me. 1992).

[6] The defendant also contends that 15 M.R.S.A. § 704 has been superseded by the Maine Tort Claims Act. Motion at 19. This is an issue which the Maine Law Court has declined to address. *Richards v. Town of Eliot*, 780 A.2d 281, 294 n.10 (Me. 2001). The defendant makes only a one-sentence, conclusory argument on this issue. In the absence of developed argument, this court will not (*continued on next page*)

arrest is sufficient to absolve a police officer from all liability under the statute is contrary to the plain language of the statute. The only authority cited by the defendant in support of this position, *Richards v. Town of Eliot*, 780 A.2d at 294, does not so hold. In that case, the only issues were whether the officers were required to obtain a warrant for the plaintiff's arrest and whether they detained her longer than necessary without a warrant. *Id*. at 294. Neither issue is raised here. In this case, the claim appears to be that the defendant's entry into the apartment and alleged use of excessive force in making the arrest constituted wanton or oppressive conduct. Amended Complaint ¶ 23. The defendant's first contention is belied by the summary judgment record. If the plaintiff's testimony is believed, a reasonable juror could conclude that the defendant's conduct in effecting the arrest, as previously discussed, was wanton or oppressive. The defendant's entry into the apartment, however, even if illegal, cannot fairly be so characterized. He is entitled to summary judgment on Count II as to any claim based on the entry, but not to any claim based on his alleged use of force during the arrest of the plaintiff and her removal from the apartment to the police van.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to any claims based on the constitutional right of due process and as to any claim in Count II based on the defendant's entry into the plaintiff's apartment, and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days

consider the point. *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990).

after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of August 2003.

_____
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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